85-366 (1)

Supreme Court, U.S.
FILED
SEP 3 1985
JOSEPH F. SPANIOL, JR.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHNNY KING,
Petitioner,

vs.

ROBERT H. LOVE,
Respondent.

On A Writ Of Certiorari To The
United States Court of Appeals
for the Sixth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the absolute immunity of any judge violates a person's rights to equal protection under the law?

2. Whether the illegal and improper taking of a person's property without due process of law by a judge denies that person of equal protection of the law?

3. Whether a judge of a municipal court acts in absence of jurisdiction rather than in excess of jurisdiction in jailing a person for contempt of court when, by statute, said judge's contempt powers are limited to a ten dollar fine only?

4. Whether a judge of a municipal court, a court of limited jurisdiction, may be sued for judicial acts done in excess of jurisdiction, rather than in clear absence of jurisdiction?

5. Whether the Court of Appeals for the Sixth Circuit should have remanded the case on the issue of damages only rather than for a new trial since liability has been determined in the case that the Respondent did engage in non-judicial conduct?

6. Whether or not the District Court and the Court of Appeals have any obligation to enforce a consent order of which the petitioner was an intended beneficiary or whether the consent order is just a "sham" and "farce" which has no force and effect and is unenforceable with no cause of action for its breach?

PARTIES

The parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

Johnny King.....Petitioner

Robert H. Love...Respondent

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NO.

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JOHNNY KING,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Johnny King, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on July 3, 1985.

OPINIONS BELOW

The judgment sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit (No. 83-5927)[1] vacating the judgment

[1] King Appendix Exhibit A at A-1.

of the United States District Court for the Western District of Tennessee, Western Division (No. 81-2016)[2], and remanding for further proceedings.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit (No. 83-5927) vacating and remanding the judgment below was entered on July 3, 1985; the judgment of the United States District Court for the Western District of Tennessee, Western Division (No. 81-2016-M) awarding the Plaintiff (Petitioner) $60,000.00 was entered November 10, 1983, at 1:00 p.m.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1).

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2 King Appendix Exhibit B at A-14.

CONSTITUTIONAL PROVISIONS

This case involves Amendment XIV to the Constitution of the United States, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Amendment XIV (Section 1) [1868] Constitution of the United States of America

STATUTORY PROVISIONS

28 U.S.C. §1331:

> Section 1331. Federal question - Amount in controversy - Costs - (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. (June 25, 1948 c. 646, § 1, 62 Stat. 930; July 25, 1958, P.L. 85-554, § 1, 72 Stat. 415.)

28 U.S.C. §1343:

1343. Civil rights and elective franchise. - The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. (June 25, 1948, c. 646, § 1, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, P.L. 85-315, Part III, § 121, 71 Stat. 637.)

42 U.S.C. §1983:

§1983. Civil action for deprivation of rights - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. §1979.)

Tenn. Code Ann. §29-9-103:

> 29-9-103. Punishment. - (a) The punishment for contempt may be by fine or by imprisonment, or both.
>
> (b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and all other courts are limited to a fine of ten dollars ($10.00). [Code 1858, § 4107; Shan., § 5919; Code 1932, §10120; T.C.A. (orig. ed.), § 23-903.]

STATEMENT OF THE CASE

In January, 1979, Petitioner Johnny King's driver's license was stolen from his place of employment. Petitioner reported this theft immediately to the Tennessee Department of Safety. On February 4, 1979, W.C. Anderson was arrested by Memphis Police Officers on a charge of driving while intoxicated. Upon his arrrest, Anderson produced the Petitioner's stolen driver's license and he was therefore arrested as Johnny King -- a fact which Anderson never officially corrected. Anderson subsequently failed to appear in City Court at the hearing on the ticket and an arrest warrant for Johnny King was issued. Upon learning of the outstanding warrant, King voluntarily went to the warrant squad to explain the error. Lieutenant Collins compared the photographs of the man arrested on the DWI charge (Anderson) to the Petitioner and noted that, indeed, these were two different men. The Petitioner was advised by a City Prosecutor to appear in City Court anyway and he set an October date for the appearance.

The Petitioner returned in October, only to find a different prosecutor who was unfamiliar with the mix-up in identities. Petitioner attempted to explain the mistake to then City Court Judge Robert H. Love (Respondent), producing various items of identification, but the Respondent simply continued the matter with the admonition that Petitioner retain an attorney to represent him.

When Petitioner reappeared before Respondent Love on December 12, 1979, he attempted to

explain that he had contacted several attorneys, none of whom would represent him for less than $500.00, and that he could not afford to pay that much just to straighten out a case of mistaken identity. Respondent Love however, continued the case once again, repeating his instruction that Petitioner King hire a lawyer.

Petitioner King appeared before Respondent Love a third time on March 4, 1980 -- again without an attorney. He calmly tried to explain to Respondent Love, but Love refused to listen and ordered him immediately incarcerated without bond for contempt in having appeared again without counsel. Respondent Love testified at trial that King shouted and shook his fist and so he jailed him for his conduct rather than for appearing without counsel. Petitioner had requested a Public Defender at the third setting, but Love denied the request.

Petitioner remained in Jail from 2:00 p.m. on March 4, until 10:00 a.m. on March 7, and was released only upon the intervention of W. Otis Higgs, an attorney hired by Petitioner's mother. The mistaken DWI charge against King was dropped and a bench warrant for W.C. Anderson was issued.

Petitioner subsequently filed a complaint against Love with the Tennessee Court of the Judiciary, and a hearing on this Complaint was set for August 20, 1980.

In June of 1980, Respondent Love sought out Memphis Police Officer Milton Pittman and

requested that Pittman as a favor to Love, execute the Anderson warrant, since the subject of the warrant had filed a complaint against him (Love). In a subsequent telephone conversation between Pittman and Love, Pittman told Love he had located the man to be arrested, thinking that Petitioner King and Anderson were one and the same man. Pittman and Respondent Love later met by accident at lunch, and upon Love's inquiry about the execution of the warrant, Pittman stated that it would be executed when another officer returned from vacation. At this time, Respondent Love instructed Pittman to change the warrant from a $2,500.00 bond to no bond. Pittman then told Love that the ticket and the warrant named two different men (King and Anderson) and Respondent Love told Pittman that they were "one and the same". At trial, Love denied making this statement but testified that he wanted the warrant executed in order that he could investigate a rumor he had heard to the effect that King had illegally sold his license to Anderson.

On August 19, 1980, one day prior to the Court of the Judiciary hearing at which Petitioner King was to testify, Officer Pittman and Officer Robert Green appeared at Petitioner's home to arrest him on the Anderson warrant. Petitioner's attempts to explain the mistake were to no avail -- King was arrested anyway. While en route to the police station, Petitioner again tried to explain the mistake to the officers who, according to the Petitioner, stated something to the effect that Judge Love was trying to put them in the middle of all this.

Instead of taking Petitioner through the usual arrest procedures, the officers took him to the Bureau of Identification where a fingerprint analysis revealed that King and Anderson were two different people. The officers then took King to then-police legal advisor Clyde Keenan, who took King before Respondent Love in open Court. Upon seeing King, Love recessed Court, left the bench and talked with Keenan privately. Keenan testified that Love told him this was the man who was to testify against him at the judiciary hearing. Keenan then informed Love that they could not hold him unless Love could tell him he was the man wanted under the warrant. Love told Keenan to release King, and after several hours, King was taken home.

On January 8, 1981, Petitioner King filed suit against Respondent Love and the City of Memphis under 42 U.S.C. §1983, alleging federal court jurisdiction under 28 U.S.C. §§1331 and 1343. He later amended his complaint, adding as defendants Prosecutors William Bond and William Eppes, and the two police officers, Pittman and Green. Bond, Eppes, Pittman and Green were dismissed from the suit on October 5, 1981, but the Court denied Love's and the City's motions to dismiss. On June 1, 1982, Petitioner King was once again allowed to amend his complaint to add officers Pittman and Green and the officers' subsequent motion to dismiss was denied. On September 10, 1982, however, the Court granted the City of Memphis's motion for judgment on the pleadings. Petitioner King was permitted to amend his Complaint one additional time on June 10, 1983, to add a cause of action for breach of

contract based on Respondent Love's failure to honor a consent order executed in the case of *Liddell v. Love*, U.S. District Ct., W.D. Tenn., No. C-77-2464.[3] The case went to trial in November of 1983, and a jury entered a verdict in favor of Officers Pittman and Green and against Respondent Love in the amount of $60,000.00 -- $10,000.00 compensatory and $50,000.00 punitive. Respondent Love appealed from this judgment, entered November 9, 1983, and on July 3, 1985, the United States Court of Appeals for the Sixth Circuit ordered the judgment vacated and the case remanded for trial on the second arrest incident, ruling that Respondent Love was absolutely immune from damages caused by the first arrest incident.

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3 King Appendix Exhibit C at A-15.

REASONS FOR GRANTING THIS PETITION

Introduction

Petitioner urges this Honorable Court to grant this Petition for Certiorari to decide an important constitutional issue which has been raised by this case. That issue is whether a municipal court judge shall be absolutely immune from an act done in violation of an individual's constitutional rights to due process and equal protection of the laws. Further, shall a municipal court judge be absolutely immune from an act done in direct violation of a previous consent order to which that same judge was a party.

The second consideration in this Petition is that the decision of the United States Court of Appeals for the Sixth Circuit conflicts with applicable decisions of this Honorable Court. An additional related issue is whether the Court of Appeals for the Sixth Circuit should have remanded the case on the issue of damages only as to the second arrest instead of remanding for retrial, due to the fact that Love's liability for the second arrest (as a non-judicial act) was never disputed.

Discussion

The facts do not dispute that Petitioner King *was not* the person arrested in January of 1979, and should not have had a bench warrant issued on him. Nevertheless, not being able to afford an attorney, he appeared before Respondent Love three times *pro se* and on

two occasions he was instructed to return with an attorney. On the third occasion, he was jailed without bond -- no questions asked, even though Tennessee Code Annotated §29-9-103 limited Love's contempt powers to a $10.00 fine. Not once during these three appearances was Petitioner King provided the opportunity to produce the ample evidence he had to show that he was not the one who was sought on the warrant. Not once was an inquiry made about Petitioner King's ability to pay a lawyer. Not once did Respondent Love suggest appointment of a public defender, and even dismissed the idea when Petitioner King suggested it. As is evident in the Consent Decree in *Liddell* v. *Love*[4], Respondent Love was under a duty to inquire of King's ability to hire a lawyer and either appoint a public defender or allow King time to work to hire a lawyer. The Court of Appeals for the Sixth Circuit failed to address the issue of the Consent Decree which had been previously entered against Love in another case. The Court's failure or refusal to address the issues raised by the amendment adding the consent decree as a cause of action renders the decree nothing more than a hollow shell -- a piece of paper with a collection of meaningless signatures and even more meaningless statements and promises. The instant case, however, was evaluated by the Sixth Circuit as one sounding in tort and civil rights only, and not also one in contract. Under *Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), a

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4 King Appendix, Exhibit C at A-15.

consent decree has attributes both of contract and of judicial act, and such decrees are construed for enforcement purposes as contracts.

Therefore, in his actions during the first arrest incident, Respondent Love not only denied Petitioner King equal protection under the laws, he ordered King incarcerated without bond in violation of his rights to due process. King was not even allowed to argue or present evidence in his own behalf. Further, Respondent Love was not even held responsible for a breach of contract -- a contract of which the District Court took judicial notice during trial.

Under Rule 17(c) of the Rules of the Supreme Court of the United States, one important consideration in the granting of a Petition for Certiorari is when a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. This consideration is present in the instant case.

Judicial immunity has been an important issue before this Court, and this Court has had many occasions to address the issue, even as early as 1872 in *Bradley* v. *Fisher*, 80 U.S. (130 Wall.) 335 (1872). In *Bradley*, this Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and

are alleged to have been done maliciously or corruptly." *Id.* at 351.

Further, this Court re-emphasized its position that judges of courts of superior or general jurisdiction are afforded a much more comprehensive immunity than judges of courts of limited or inferior jurisdiction in *Randall v. Brigham*, 74 U.S. 523 (1869), and *Alzua v. Johnson*, 231 U.S. 106 (1913).

Yet the Sixth Circuit Court of Appeals, in its decision in the instant case, chose to dismiss this Court's differentiation between general and limited jurisdictional courts as "dicta". The Sixth Circuit Court points out that the fact that Respondent Love's court was one of limited jurisdiction was not contested, but then holds that judges of courts of limited jurisdiction are entitled to absolute immunity for judicial acts unless done in clear absence of all jurisdiction, despite the clear language of *Bradley*, *Randall* and *Alzua*, supra.

The Sixth Circuit reasoned that since *Alzua*, *Bradley* and *Randall* involved cases against judges of general courts, any statements made by this Court regarding limited jurisdiction courts were simply dicta. Therefore, at best, this decision presents a conflict between the Sixth Circuit and applicable Supreme Court decisions. At worst, it presents an important question of law which has, up to now, only been addressed by this Court by way of dicta, at least according to the Sixth Circuit.

If this Court determines that the question presented by the "general vs. limited" standard has been addressed and answered by this Court in *Bradley*, *Alzua* and *Randall*, then the Sixth Circuit's decision in the instant case is in direct conflict with this Court's decisions. If this Court rules that this question has not been directly addressed and answered, then Petitioner King urges that it should be, and this case presents an ideal opportunity.

Finally, Petitioner seeks this Court's determination on the issue of whether the Sixth Circuit was correct in remanding the case for retrial on the issues connected with the second arrest, or whether the Court of Appeals should have remanded the case for a determination of damages only, since there is little doubt that the jury awarded damages in part for Respondent Love's procurement of King's second arrest. Under applicable standards of review, the Court of Appeals, in viewing the evidence in a light most favorable to the prevailing party (*Calhoun* v. *Baylor*, 646 F.2d 1158 (6th Cir. 1981)), should have remanded the case for determination of damages only -- not for a retrial of the issues on the second arrest. Therefore, the Court of Appeals' decision does not comport with a basic tenet of appellate practice.

CONCLUSION

For the reasons stated and incorporated by reference, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHNNY KING

By: _____

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And

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on behalf of Johnny King were served on this 31st day of August, 1985, on the following counsel of record, by first class mail, postage prepaid:

Mr. James D. Causey
Attorney for the Respondent
208 Adams Avenue
Memphis, Tennessee 38103

APPENDIX

EXHIBIT A

No. 83-5927

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHNNY KING,
Plaintiff-Appellee,

vs.

ROBERT H. LOVE,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed July 3, 1985

Before: KENNEDY and CONTIE, Circuit Judges; and KINNEARY, District Judge.*

CONTIE, Circuit Judge. Defendant Robert Love, a City Court judge in Memphis, Tennessee, appeals from a jury verdict awarding $10,000 in compensatory damages and $50,000 in punitive damages to plaintiff Johnny King in this action arising under 42 U.S.C. § 1983. For the reasons set forth below, we vacate the judgment and remand for further proceedings.

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* The Honorable Joseph P. Kinneary, United States District Judge for the Southern District of Ohio, sitting by designation.

I.

In January 1979, King reported to the Tennessee Department of Safety that his driver's license had been stolen. The Department issued a replacement license. On February 4, 1979, W. C. Anderson was arrested for driving while intoxicated. He produced King's stolen license, however, and the police completed the ticket in King's name. Anderson subsequently failed to appear in court to answer the charge. As a result, an arrest warrant in King's name was issued. King eventually learned of the warrant and voluntarily contacted the police Warrant Squad and a member of the City Prosecutor's staff in order to explain that a mistake had been made. The prosecutor instructed King to appear in Memphis City Court.

When King appeared in court before Judge Love on October 5, 1979, a different prosecutor was present. Although King offered to explain the mistake, Judge Love continued the case and instructed him to retain an attorney. King reappeared before Judge Love without counsel on December 12, 1979. King testified at trial that he had contacted several lawyers between early October and early December 1979. Although he was working in late 1979, he testified at trial that he could not afford an attorney at that time. The record reflects that when King reappeared without counsel, Judge Love again continued the case and instructed him to hire a lawyer.

King appeared before Judge Love without counsel for a third time on March 4, 1980. King later testified that although he calmly attempted to explain the mistaken identity problem, Judge Love refused to listen and ordered him to be incarcerated without bond for contempt in having again appeared without counsel. Judge Love testified that King shouted and shook his fist and that King was jailed for this contemptuous conduct rather than for appearing without counsel.

It is undisputed that King remained in jail from 2:00 P.M. on March 4 until 10:00 A.M. on March 7. Attorney Otis Higgs obtained King's release. The erroneous driving while intoxicated charge against King was dropped and a warrant for Anderson's arrest was issued. King subsequently filed a complaint against Judge Love with the Tennessee Court of the Judiciary. That disciplinary tribunal scheduled a hearing for August 20, 1980.

In June 1980, Judge Love asked police officer Pittman to do him a "favor" by executing the Anderson arrest warrant. Pittman testified that Judge Love stated that the subject of the warrant had filed a complaint against him. Pittman and Judge Love subsequently had a telephone conversation during which Pittman indicated that he had located the man to be arrested. At this time, Pittman thought that King and Anderson were the same person. Sometime later, Pittman and Judge Love met by chance at lunch. In response to Judge Love's inquiry about whether the Anderson arrest warrant had been executed, Pittman stated that it would be executed when another police officer returned from vacation. Judge Love instructed Pittman to change the warrant from $2,500 bond to no bond. Pittman then informed Judge Love that the ticket and the arrest warrant named different persons, *i.e.*, King and Anderson respectively. Pittman testified that Judge Love responded that King and Anderson "were one and the same" (Tr. at 439). Judge Love denied making that statement. He further testified that he wanted the warrant executed so that he could investigate a rumor heard from a man, identified only as one who "frequently hung around the police station" (Tr. at 231), that King had illegally sold his license to Anderson.

On August 19, 1980, one day before the hearing scheduled by the Tennessee Court of the Judiciary, officers Pittman and Green appeared at King's home with the Anderson arrest warrant. The officers asked for "W. C. Anderson, alias Johnny King" (Tr. at 28). King testified that although he attempted

to explain the officers' mistake, they arrested him anyway. During the trip to the police station, King again protested that a mistake had been made. According to King, officer Green responded that "Judge Love is trying to put us in the middle of this" (Tr. at 31).

The officers took King to the Bureau of Identification where fingerprint analysis revealed that King and Anderson were indeed different people. Police legal advisor Keenan then took King before Judge Love in order to determine which man Love wanted. Upon seeing King, Judge Love recessed the court and talked privately with Keenan. Keenan's testimony about his conversation with Judge Love follows:

> He [Judge Love] told me: "Do you know who, who this guy is?" I said: "No." He said: "This is the guy that is scheduled to testify against me in the judiciary panel." I did not know that there was a hearing scheduled. I, I wasn't aware of that, really, at that point in time. So I said: "Well, I understand; however, Your Honor, we can't hold this man. We are going to have to release him unless you can tell me this is the guy that is wanted on the warrant." He said: "Well, go ahead and release him then." I said: "Fine," and we turned and I took Mr. King back to the prosecutor's office. [Tr. at 346.]

Keenan then instructed officers Pittman and Green to take King home. The August 19 episode lasted several hours.

King subsequently sued the City, Judge Love and officers Pittman and Green. Count One of the complaint alleged that Judge Love had unlawfully incarcerated him on March 4, 1980. Count Two alleged that Judge Love and officers Pittman and Green had participated in an illegal arrest on August 19, 1980. The district court dismissed King's action against the City and the jury returned a verdict in favor of the police officers. These determinations are not at issue on this appeal. The district court ruled that Judge Love was not entitled either to absolute judicial immunity or to a directed verdict.

The jury awarded King $10,000 in compensatory damages and $50,000 in punitive damages. On appeal, Judge Love contends that this action is barred under the doctrine of absolute judicial immunity, that the district court should have granted a directed verdict and that the district court committed other reversible errors during trial. Since the judgment must be vacated and the case remanded for a new trial, we address only the first two issues.

II.

In analyzing the absolute judicial immunity claim, Judge Love's conduct with respect to the March 4, 1980 and August 19, 1980 incidents must be considered separately. We address the March 4, 1980 incident first.

The parties agree that the driving while intoxicated allegation asserted against King was a misdemeanor charge. Section one of Chapter 288 of the Private Acts of Tennessee of 1972 provides that municipal courts in counties having a population of 600,000 or more have concurrent jurisdiction with the criminal courts and general sessions courts over all misdemeanors. Under this section, municipal courts in Shelby County, Tennessee, where Memphis is located, have jurisdiction over misdemeanor cases. Thus, the City Court over which Judge Love presided had subject matter jurisdiction in King's case.

The contempt powers of Tennessee judges are statutorily defined. Tenn. Code Ann. § 29-9-103. That section states that "where not otherwise specifically provided," circuit, chancery and appellate courts may impose no more than ten days in jail and a fifty dollar fine for contempt. All other courts are limited to imposing a ten dollar fine. Since the Memphis City Court is not a circuit, chancery or appellate court, judges presiding over that court may impose no more than a ten dollar fine for contempt of court. Although Chapter 288 of the Private Acts of Tennessee of 1972 grants the Memphis

City Court concurrent jurisdiction with the criminal courts and general sessions courts over misdemeanor cases, that Chapter does not specifically provide for expanded contempt powers as required by Tenn. Code Ann. § 29-9-103. Consequently, Judge Love exceeded his authority in jailing King for contempt on March 4, 1980.[1]

If the Memphis City Court were a court of general jurisdiction, then Judge Love would be entitled to absolute judicial immunity with respect to the March 4, 1980 incident even though he exceeded his authority. Provided that they do not engage in non-judicial acts or act in the clear absence of all jurisdiction, judges presiding over courts of general jurisdiction are absolutely immune from suits for damages even if they act erroneously, corruptly or in excess of jurisdiction. *See, e.g., Stump* v. *Sparkman*, 435 U.S. 349, 356-59 (1978); *Bradley* v. *Fisher*, 80 U.S. [13 Wall.] 335, 351 (1871); *Sevier* v. *Turner*, 742 F.2d 262, 271 (6th Cir. 1984). An act is non-judicial if it is one not normally performed by a judicial officer or if the parties did not deal with the judge in his official capacity. *See Stump*, 435 U.S. at 362. A judge acts in the clear absence of all jurisdiction if the matter upon which he acts is clearly outside the subject matter jurisdiction of the court over which he presides. *See Stump*, 435 U.S. at 357-59; *Bradley* 80 U.S. at 351-52. Since questions regarding subject matter jurisdiction often are difficult, "the scope of [a] judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." *Stump*, 435 U.S. at 356. Moreover, actions taken in the clear absence of all jurisdiction must be distinguished from those taken in excess of jurisdiction. *See Bradley*, 80 U.S. at 351. Thus, a judge of

[1] The recent Opinion No. 84-283 issued by the Attorney General of the State of Tennessee on October 18, 1984 is not to the contrary. In that situation, the City's charter expressly granted to City judges the same contempt powers as circuit and criminal court judges. Unlike the present case, therefore, the special provision requirement of Tenn. Code Ann. § 29-9-103 was satisfied.

a court of general jurisdiction is absolutely immune from an action for damages if he exceeds his authority in resolving a matter over which his court has subject matter jurisdiction. *See Stump*, 435 U.S. at 357-59 (judge immune even though he exceeded his authority in ordering a woman to undergo an involuntary sterilization); *Bradley*, 80 U.S. at 352 (judge is immune even if he exceeds his authority either in labelling permissible conduct as criminal or in sentencing a person to greater punishment than provided by law).

In the present case, Judge Love's decision to incarcerate King was a judicial act because jailing persons for contempt of court is a function normally performed by judges and because King and the prosecutor were dealing with Judge Love in his official capacity during the March 4, 1980 proceeding. Furthermore, although Judge Love exceeded his authority in incarcerating King rather than fining him not more than ten dollars, the City Court had subject matter jurisdiction over the misdemeanor charge. Since Judge Love acted in excess of jurisdiction rather than in the clear absence of all jurisdiction, he would be entitled to absolute immunity were the Memphis City Court a court of general jurisdiction.

The district court found, however, that the Memphis City Court is a court of limited jurisdiction. Neither party contests this finding. The question arises, therefore, of whether judges presiding over courts of limited jurisdiction may be sued for judicial acts done merely in excess of jurisdiction or whether plaintiffs must prove that such judges have acted in the clear absence of all jurisdiction as required by *Stump* and *Bradley*.

The district court held that judges of courts of limited jurisdiction may be sued for judicial acts done merely in excess of jurisdiction (App. at 55-56). Although the Supreme Court cases relied upon by the district court contain language supporting such a view, *see Alzua* v. *Johnson*, 231 U.S. 106, 111 (1913); *Bradley*, 80 U.S. at 351; *Randall* v. *Brigham*, 74 U.S. [7 Wall.] 523, 535-36 (1868), we hold that judges of courts of limited jurisdiction are entitled to absolute immunity for their

judicial acts unless they act in the clear absence of all jurisdiction.

First, we emphasize that since the *Alzua*, *Bradley* and *Randall* cases involved suits against judges of courts having general jurisdiction, any statements made by the Supreme Court about judges of courts having only limited or inferior jurisdiction were *dicta*. Moreover, in *Bradley*, 80 U.S. at 351, the court simply summarized statements made in *Randall*. In turn, *Randall* merely assumed for purposes of argument that judges of courts of limited jurisdiction are entitled to less protection than judges of courts of general jurisdiction:

> In reference to judges of limited or inferior authority, it has been held that they are protected only when they act within their jurisdiction. *If this be the case with respect to them*, no such limitation exists with respect to judges of superior or general authority. [Emphasis supplied.]

74 U.S. at 535-36. Thus, even the persuasive value of the *dicta* in *Bradley* and *Randall* is low.

Second, both this circuit and other circuits have applied the broader absolute immunity standard to judges of courts of limited jurisdiction. In *Castorr* v. *Brundage*, 674 F.2d 531, 537 (6th Cir.), *cert. denied*, 459 U.S. 928 (1982), for example, this court held, citing *Stump*, that a judge in the Juvenile Division of a county Probate Court was absolutely immune from an action for damages. The *Stump* case, of course, involved application of the clear absence of all jurisdiction standard. *See also Hurlburt* v. *Graham*, 323 F.2d 723, 725 (6th Cir. 1963) (where a justice of the peace had subject matter jurisdiction over a reckless driving charge, he was absolutely immune from an action for damages).

The Fifth, Seventh and Ninth Circuits have also held that regardless of the status that a state judge has in the judicial hierachy, he is entitled to absolute immunity for judicial acts

not done in the clear absence of all jurisdiction. *See Ammons* v. *Baldwin*, 705 F.2d 1445, 1447 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 999 (1984) (justice of the peace); *Brewer* v. *Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982) (justice of the peace); *Lopez* v. *Vanderwater*, 620 F.2d 1229, 1234 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980); *O'Neil* v. *City of Lake Oswego*, 642 F.2d 367, 368 n.2 (9th Cir. 1981); *Gregory* v. *Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (justice of the peace). The *Lopez* and *O'Neil* cases are particularly instructive. The *Lopez* decision involved conduct of a local judge who, like Judge Love, had jurisdiction only in misdemeanor cases. The Seventh Circuit nevertheless applied *Stump* and held that because the judge had subject matter jurisdiction over the misdemeanor charge in question, the judge did not act in the clear absence of all jurisdiction in arraigning, convicting and sentencing the defendant even though grave irregularities marked the proceedings. 620 F.2d at 1234. In *O'Neil*, a *pro tem* municipal court judge, as did Judge Love, exceeded his authority in convicting a defendant of, and having him incarcerated for, contempt of court. The Ninth Circuit applied the clear absence of all jurisdiction standard and held that because the judge possessed jurisdiction over the subject matter, he was absolutely immune from suit. 642 F.2d at 368-70.[2]

Third, the federal courts have applied the *Stump-Bradley* clear absence of all jurisdiction standard to the judicial acts of federal judges. Under these decisions, federal judges are

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[2] On its facts, *Pulliam* v. *Allen*, —— U.S. ——, 104 S. Ct. 1970 (1984), supports the conclusion that state judges presiding over courts of limited jurisdiction are entitled to the same immunity (or lack thereof) as are judges of courts of general jurisdiction. In *Pulliam*, the petitioner was a state magistrate in a court of limited jurisdiction. In holding that injunctive and declaratory relief could be obtained against the judge and that an award of attorney's fees was available to the plaintiff under 42 U.S.C. § 1988, the Court did not distinguish between judges of courts of limited and general jurisdiction. The Court clearly intended its decision to apply to both types of judges.

absolutely immune from suits for damages even if they act in excess of jurisdiction. *See United* v. *Claiborne*, 727 F.2d 842, 845 (9th Cir.), *cert. denied*, 105 S. Ct. 113 (1984) (citing *Stump*); *Skolnick* v. *Campbell*, 454 F.2d 531, 533 (7th Cir. 1971); *O'Bryan* v. *Chandler*, 352 F.2d 987, 988 (10th Cir. 1965), *cert. denied*, 384 U.S. 926 (1966); *Heasley* v. *Davies*, 342 F.2d 786, 788 (8th Cir. 1965); *Meredith* v. *Van Oosterhout*, 286 F.2d 216, 220 (8th Cir. 1960), *cert. denied*, 365 U.S. 835 (1961). The federal courts indisputably are courts of limited jurisdiction. Consequently, the cited cases support the proposition that judges of courts of limited jurisdiction are absolutely immune from suits for damages if they act in excess of jurisdiction but do not act in the clear absence of all jurisdiction.[3]

Fourth, applying the clear absence of all jurisdiction standard to judges of courts of limited jurisdiction comports with the policy expressed in *Bradley* that where a court has subject matter jurisdiction over a particular controversy, the judge should be absolutely immune from a damages action stemming from his decision about the extent of his authority:

> But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case. . . . Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised.

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[3] Both *Stump* and *Bradley* applied the clear absence of all jurisdiction standard to courts of "superior" or "general" jurisdiction. *See* 435 U.S. at 356; 80 U.S. at 351. It could be argued that although the federal courts are courts of limited jurisdiction, they nevertheless are "superior" courts. The term "superior court" is defined, however, as a court of "general or extensive jurisdiction." Black's Law Dictionary 1289 (5th Ed. 1979). Thus, the terms "general" and "superior" appear to be synonymous.

80 U.S. at 352. We acknowledge that a plaintiff will often find it easier to prove that a judge of a court of limited jurisdiction acted in the clear absence of all jurisdiction than a judge of a court of general jurisdiction because the subject matter jurisdiction of a court of limited jurisdiction often is unambiguously defined by statute. We hold only that where a judge of a court of limited jurisdiction engages in judicial acts in deciding a case over which the court has subject matter jurisdiction, he is absolutely immune from suits for damages even if he exceeds his authority or his jurisdiction. Since the Memphis City Court had subject matter jurisdiction over the driving while intoxicated charge against King and since incarcerating King for contempt of court was a judicial act, King may not sue Judge Love for damages stemming from the March 4, 1980 incident.

III.

We next consider Judge Love's conduct in connection with King's arrest on August 19, 1980. As has been indicated, officer Pittman testified that Judge Love requested him to execute the Anderson arrest warrant, instructed him to change the warrant to a no bond warrant and told him that King and Anderson were the same person. King contended at trial that Judge Love wanted him arrested in order to pressure him not to testify at the Tennessee Court of the Judiciary hearing scheduled for the next day. Judge Love testified, however, that he did not tell Pittman that King and Anderson were the same person.

We hold that although Judge Love performed a judicial act in ordering that there be no bond on the Anderson arrest warrant,[4] deliberately misleading officer Pittman about the separate identities of King and Anderson, if Judge Love did

[4] The record is unclear concerning who issued the Anderson arrest warrant.

so, was a non-judicial act. The record contains evidence that Judge Love told Pittman that King and Anderson were the same person in a private conversation occurring well after the Anderson arrest warrant had been issued. Although setting the amount of bond on an arrest warrant is a function normally performed by a judge, *see Stump*, 435 U.S. at 362 (standard articulated); *Sevier*, 742 F.2d at 272 (same), the act of deliberately misleading officers who are to execute a warrant about the identity of the person sought well after the warrant has been issued is not. Accordingly, if officer Pittman's account of his conversations with Judge Love is accurate, then Judge Love is not entitled to absolute judicial immunity in connection with the August 19, 1980 incident.

Since the jury rendered a general verdict, however, we are unable to discern which account of the events of August 19, 1980 that it believed. For instance, the jury may have disbelieved King's testimony about the August 19 incident and based the entire verdict upon the protected conduct of March 4, 1980. Unlike some state courts, the federal courts do not assume that the jury decided all issues in the prevailing party's favor. *See Aquionics Acceptance Corp.* v. *Kollar*, 503 F.2d 1225, 1227 (6th Cir. 1974); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 390 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963). Thus, the verdict in this case cannot stand. Moreover, even if the jury accepted King's version of what transpired on August 19, 1980, it still may have based part of its verdict on the immunized conduct of March 4, 1980. Since there is no assurance that the entire verdict was based upon Judge Love's allegedly non-judicial conduct in procuring King's arrest on August 19, 1980, the judgment must be vacated and the case remanded for a new trial.

IV.

Judge Love's final argument is that no remand is necessary because the district court should have granted his motion for

directed verdict. In view of our disposition of King's claim regarding the March 4, 1980 incident, we consider this assignment of error only as to the claim involving the August 19, 1980 arrest.

This court's standard of review is identical to the standard used by the district court. *See Hersch* v. *United States*, 719 F.2d 873, 877 (6th Cir. 1983). A motion for directed verdict should be granted only if, viewing the evidence and the inferences that reasonably may be drawn therefrom in the light most favorable to the party opposing the motion, there is "a complete absence of pleading or proof on an issue or issues material to the cause of action or . . . there are no controverted issues of fact upon which reasonable men could differ." *Duncan* v. *City of Oneida*, 735 F.2d 998, 999 (6th Cir. 1984). *See also Hersch*, 719 F.2d at 876-77; *Rockwell International Corp.* v. *Regional Emergency Medical Services of Northwest Ohio, Inc.*, 688 F.2d 29, 31 (6th Cir. 1982). Under this standard, the district court correctly refused to grant a directed verdict to Judge Love. Officer Pittman testified, for instance, that Judge Love told him that the subject of the Anderson arrest warrant had filed a complaint against him and that King and Anderson were the same person. Although Judge Love denied making these statements, a reasonable jury could have believed Pittman. We have already held that if Pittman's testimony were believed by a jury, then Judge Love engaged in non-judicial conduct.

The judgment of the district court is VACATED and the case is REMANDED for a new trial. Punitive damages may be awarded on retrial if the jury finds liability and if the standards set forth in *Smith* v. *Wade*, 461 U.S. 30, 56 (1983) and *Grimm* v. *Leinart*, 705 F.2d 179, 182 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1415 (1984), are satisfied. The parties shall bear their own costs on this appeal.

EXHIBIT B

JUDGMENT IN A CIVIL CASE

United States District Court
Western Tennessee - Western Division

Case Title
JOHNNY KING, Plaintiff

v. Docket Number: 81-2016-M

ROBERT H. LOVE, Defendant

Judge ROBERT M. MCRAE JR.

x Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

That the plaintiff JOHNNY KING, recover of the defendant ROBERT H. LOVE the sum of sixty thousand dollars (ten thousand dollars as compensatory damages and fifty thousand dollars as punitive damages) with interest thereon at the rate of 9.86 percent as provided by law and his costs of action.

Filed Nov. 10, 1983

APPROVED:

/s/
ROBERT M. McRAE JR.
UNITED STATES DISTRICT JUDGE

Entered on docket sheet on Nov. 10, 1983

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JOE E. LIDDELL, Individually
and on behalf of all other persons
similarly situated;
PLAINTIFFS

VS. CIVIL ACTION
NO. 77-2464

HONORABLE ROBERT LOVE, Judge
of the City Court of
Memphis, Tennessee,
DEFENDANT

COMPLAINT

PRELIMINARY STATEMENT

1. This is a class action challenging the practice of refusing to appoint public defenders for persons who are charged with driving while intoxicated offenses and who are unable financially to hire an attorney for representation in such cases.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(3). This is an

action brought pursuant to 42 U.S.C. §1983 to redress the deprivation under color of state law of rights, privileges, and immunities secured to the plaintiffs by the Constitution of the United States and 28 U.S.C. §§2201 and 2202 providing for declaratory and injunctive relief.

CLASS ACTION

3. This is a class action brought pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure on behalf of all indigent persons who are tried in the City Court of Memphis, Tennessee, on the charge of driving while intoxicated.

4. The class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of the representative party is typical of the claims of the class; and the representative party will fairly and adequately protect the interests of the class. The parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

PARTIES

5. The named plaintiff, Joe Eddie Liddell, is 29 years of age, and is a resident of Memphis, Tennessee.

6. Defendant, Robert Love, is Judge of Division 8 of the City Court of Memphis, Tennessee,

and, as such, is responsible for the practices challenged herein. All or most DWI cases are heard in Division 8 of the City Court.

STATEMENT OF THE CASE

7. On July 22, 1977, plaintiff Joe E. Liddell appeared before defendant Judge Robert Love on a DWI charge. Plaintiff Lidell requested the appointment of a public defender since he was unemployed and without funds to hire an attorney. Defendant Love rejected this request, informing the plaintiff that if he had enough money to get drunk, he had enough money to hire an attorney. On information and belief, defendant Love has taken this same action and made the same justifying remark in numerous other DWI cases.

8. Defendant Love continued plaintiff Liddell's case until August 24, 1977, warning the plaintiff that the case definitely would be disposed of then and that he must have an attorney present to represent him. However, plaintiff Liddell is still unemployed and is without funds to hire an attorney.

9. Plaintiff Liddell was arrested on this DWI offense on September 8, 1976. Prior to the July 22, 1977 hearing, there were three previous hearings in this same case, all of which were continued for the same reasons as described above. At each hearing defendant Love did not inquire into plaintiff Liddell's financial ability to hire an attorney, did not appoint a public defender, and instructed plaintiff Liddell that he must hire private counsel.

10. The offense of driving while intoxicated carries a potential prison sentence. During the four hearings, defendant Love never made a statement that there would be no deprivation of liberty (prison sentence) upon a determination of guilt. On information and belief, the usual sentence in a first offense DWI case such as plaintiff Liddell's includes a few days of prison time that must be served by a defendant.

11. On information and belief, it is the policy and practice of all or most other judges in the City Courts of Memphis, Tennessee, to appoint the public defender to represent indigent defendants in cases involving both lesser and greater potential sentences than DWI offenses.

12. Defendant Love's refusal to appoint a public defender for plaintiff Liddell and members of the plaintiff class violate their rights under the Sixth and Fourteenth Amendments to the United States Constitution.

PRAYERS FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Honorable Court:

1. Certify this cause as a class action.

2. Enter preliminary and permanent injunctions requiring the defendant to appoint counsel to indigents charged with the offense of driving while intoxicated, where conviction of the offense will result in incarceration.

3. Enter a final judgment declaring that all indigent persons charged with the offense of driving while intoxicated and who are subjected to imprisonment upon conviction, are entitled to representation by court appointed counsel.

4. Award plaintiff reasonable attorneys' fees and all costs herein.

5. Grant such other relief as to the court may seem just and proper.

Respectfully Submitted,

/s/
Donald M. Hollingsworth

/s/
Thomas M. Daniel

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Attorneys for Plaintiff

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JOE E. LIDDELL, Individually
and on behalf of all other persons
similarly situated;
PLAINTIFFS

VS. CIVIL ACTION
NO. C-77-2464

HONORABLE ROBERT LOVE, Judge
of the City Court of
Memphis, Tennessee,
DEFENDANT

CONSENT ORDER

The parties, as evidenced by the signatures of their attorneys below, hereby consent to the entry of this Order as a complete settlement of this cause. IT IS ORDERED as follows:

1. Defendant Judge Robert Love shall appoint free counsel for all indigent persons unless the possibility of any imprisonment on the pending charge(s) has been excluded.

2. Defendant Love shall advise persons appearing in his Court of their right to counsel and their right to court appointed counsel if

they are unable financially to afford private representation, although the inquiry may be conducted through oral examination and/or a written form.

3. When it appears that a person has been temporarily indigent and has prospects for employment within a few weeks which would enable said person to afford private representation, the person's case may be continued for up to 60 days for said purpose.

4. The costs of this cause are assessed against the defendant.

/s/
U.S. DISTRICT JUDGE

/s/
Donald M. Hollingsworth

/s/
Thomas M. Daniel

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